PUBLIC PROSECUTOR

v.

ADNAN ISHAK

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRAIL NO. 47-3-90]
13 APRIL 1992

EVIDENCE: *Whether evidence of agent provocateur - Is credit worthy - Whether said evidence requires corroboration - Whether agent provocateur is an accomplice - Whether abetment by agent provocateur in the commission of an offence - Presumption - Whether unworthy by reason of the same the sole purpose of securing evidence against such person - Section 40A of Dangerous Drugs Act 1952.*

The accused, a Thai national was charged for an offence of trafficking 1779.4 grammes of cannabis, under s. 39B(i)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

The prosecution's case was that at the material time of the incident, the accused agreed to sell to an agent provocateur Constable Leau, 2 kilogrammes of cannabis. *Inter alia,* the issue before the Court was whether the evidence of Constable Leau - in totality is creditworthy and also whether the said evidence requires to be corroborated.

Held:

[1] The learned Judge opined that in considering the defence in the totality of the evidence, *inter alia,* the issue is whether the evidence of Leau is creditworthy. The evidence of Leau does not require corroboration because the evidence of a police spy or agent provocateur is not that of an accomplice and does not require corroboration.

[2] Under s. 40A of the Act no agent provocateur shall be presumed to be unworthy of credit by reason only of his, *inter alia*, having abetted the commission of an offence by any person under the Act if the abetment was for the sole purpose of securing evidence against such person. The learned Judge took the view that Leau was a careful witness. He did not exaggerate. He did make attempts to improve the prosecution case. The Court accepted his evidence.

[Accused found guilty and convicted.]

Cases referred to:
Dato' Mokhtar bin Hashim v. Public Prosecutor [1983] CLJ (Rep) 101 ***(foll)***
Rex v. Bickley 73 JP 239 ***(cit)***
R. v. Mullins 3 Cox's Cr cases 526 ***(cit)***
Teja Singh and Mohd. Nasir v. Public Prosecutor [1950] MLJ 71 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37, 39B(1)(a), (2), 40A

For the accused - Manjit Singh, Counsel
For the public prosecutor - Tun Abdul Majid b. Dato' Tun Hamzah

JUDGMENT

KC Vohrah J:

Adnan bin Ishak, a Thai national, was charged that he on 20 October 1988 at about 11.45 p.m. at Jalan Raja Kisap, Kuah, Langkawi, Kedah Darulaman trafficked in 1779.4 grammes of cannabis, an offence under s. 39B(l)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

The prosecution's case was that on 19 October 1988 the accused agreed to sell to an *agent provocateur*, Constable Leau, 2 kilogrammes of cannabis. The two men agreed to meet on 20 October 1988 at 11.30 p.m. near a bridge along Jalan Kisap. On the night of 20 October 1988 the police stationed themselves at various strategic points along Jalan Kisap from the first point which was opposite a corner shophouse to the last point which was near to the place where the two persons were supposed to meet. The accused was seen to leave the corner shophouse on a motorcycle heading in the direction of the bridge. He was tailed along Jalan Kisap by a police car to the area of a mosque where he was intercepted and arrested. A bag containing cannabis was found clipped on the flat carrier of the motorcycle between the handlebar and seat of the motorcycle. The cannabis, according to the government chemist who gave evidence in Court, weighed 1779.4 grammes.

The evidence of Constable Leau (PW6), as confirmed by the evidence of Inspector Majid (PW7), was that on 15 October 1988 he together with a police informer, Jamaluddin bin Omar, known as "Mat Kengkang" (who has since died) met with Inspector Majid.

According to Constable Leau and Inspector Majid, Mat Kengkang told Inspector Majid that a Thai national wanted to sell ganja but did not have many friends in Langkawi. Constable Leau also added that Mat Kengkang mentioned the amount of "ganja" (cannabis) that Thai wanted to sell as being 2 kilogrammes. Inspector Majid then directed Constable Leau to pose as a buyer to buy the "ganja" from the Thai national.

Constable Leau said that on 19 October 1988 at about 10.30p.m Mat Kengkang introduced him to this Thai national, the accused. This was under a big tree along Jalan Kisap. Leau said from where he was under the tree he could see the house where the accused stayed. Leau said that he himself spoke in Bahasa Malaysia and the accused spoke in Thai and Mat Kengkang acted as interpreter. According to Leau the accused at first requested RM1,000 for the 2 kilogrammes of ganja but eventually agreed to accept RM900 for it. He said that the accused agreed to deliver to him the cannabis the next night at 11.30p.m near a bridge along Jalan Kisap and they both agreed that it was not necessary for Mat Kengkang to be present at the meeting.

Leau then went back to the police station and related to Inspector Majid what had transpired. He also informed the inspector of the place where the accused was putting up. Inspector Majid in his evidence confirmed substantially what Leau stated in his evidence.

The next day, on 20 October 1988, at about 9.40 p.m. a team of 9 policemen led by Inspector Majid acting on the information given by Constable Leau, set up observation-cum-ambush points along Jalan Kisap, Kuah, Langkawi in the vicinity of the Jalan Kisap mosque and the bridge.

The first point of observation was a shophouse where the accused was staying. The mosque was between the shophouse and the bridge near where Leau and the Constable were waiting. Mat Kengkang was not in the team as Leau and the accused had agreed that it was not necessary for that man to be present. Leau explained that he did that because Mat Kengkang was his informer and he did not want to endanger his source (informer) or his safety.

Hiding near the fence of a rubber factory which was by the side of Jalan Kisap, Detective Constable Yuslan (PW6) together with Constable Rajna kept observation on the shophouse across the road, Jalan Kisap. This shophouse was the right corner shophouse of a row of shophouses as one faces the row. Yuslan saw a motorcycle parked in front of this corner shophouse. At about 11.40 p.m he saw a male person come out of the door of the said shophouse and walk towards the said motorcycle. The man placed something on the carrier of the motorcycle between the seat and the handle bar of the motorcycle after which the man walked back to the house to close the door. He then saw the man sit on the motorcycle and proceed towards Air Hangat, in the direction of the mosque and Yuslan noticed that the motorcycle had the Registration Number KS 8861.

As prearranged with Inspector Majid, Yuslan signalled through his "walkie-talkie" set to Inspector Majid who was stationed in a car with 3 others, Constables Dali and Rahman and Corporal Hamzah in between the point where Yuslan was and the mosque; the motorcyclist was going towards the direction of the mosque and Air Hangat. Inspector Majid after receipt of the information on his own walkie talkie waited for the said motorcycle to pass and he instructed the driver of his car, Dali, to start the car. Then Constable Anuar (PW10) who was about 200 metres away from him and Constable Roslan informed him that the motorcycle had just passed. Inspector Majid subsequently saw the motorcycle pass and he instructed Dali to bring the motorcycle to a stop and Dali edged the motorcycle to a stop right in front of the mosque.

Then Inspector Majid came out of the car with a torchlight and introduced himself as a police officer. The man sitting on the motorcycle was apprehended by Corporal Hamzah (PW8) and Constable Rahman. Both Inspector Majid and Corporal Hamzah identified the man as the accused.

Inspector Majid found a cloth bag (P4) on the flat carrier of the motorcycle between the handle and the seat of the motorcycle. Inside the bag was a package (P5) and when he tore open the covering he found the package contained dried leaves (P6). After the arrest was made Inspector Majid ordered Leau and Constable Nordin who were both waiting at the bridge to go back to Kuah police station which they did.

As regards the bag package and the dried leaves I am satisfied that Inspector Nasir (PW4) who received the bag (P4) and the package (P5) of dried leaves (P6) and other exhibits from Inspector Majid kept the exhibits in proper custody and that after properly packing and sealing P4, P5 and P6 he sent them to the chemist, PW1, who received them intact and properly sealed. I am also satisfied that these were the exhibits examined by the chemist and returned to PW4 and then subsequently produced in Court.

The chemist (PW1), who carried out tests on the dried leaves (P6) said that he found them to be 1779.4 grammes of cannabis within the meaning of the definition of "cannabis" in the Act. I accept his evidence.

I would like to point out that the evidence of Inspector Majid and Leau was that on the night of the ambush Mat Kengkang did not accompany them. The cross-examination of the police witnesses showed that the defence disputed that Mat Kengkang was not there. It was put to Inspector Majid (PW7) that it was Mat Kengkang who rode a motorcycle that night riding ahead of the accused; that the accused carried his own mother as pillion. It was put to Inspector Majid and Corporal Hamzah (PW8) that the arrest was effected when the accused was standing by the motorcycle and the mother sitting on it; that the mother was "manhandled" and that the bag of ganja was not recovered from the motorcycle. All these allegations were denied categorically.

It has to be noted that the prosecution called PW11, the brother-in-law of the accused, to give evidence. During the course of his evidence the prosecution sought to impeach his credit by showing material discrepancies in his evidence and in his statement to the police (P15). Bearing in mind what was stated by Abdoolcader FJ in *Dato' Mokhtar bin Hashim v. Public Prosecutor* [1983] CLJ (Rep) 101 at p. 119, I assessed his credit as a whole with the rest of the evidence including the evidence of the officer who recorded his statement at the close of the case of the prosecution. At that juncture my view was that the evidence of PW11 had to be disregarded because of three material discrepancies in his evidence and in his statement to the police.

At the close of the case for the prosecution it was established on a *prima facie* basis that on 20 October 1988 at about 11.40 p.m. the accused was seen by a police surveillance party to carry something which he placed in the carrier of a motorcycle and to leave a shophouse on the motorcycle along Jalan Kisap proceeding towards Air Hangat in the direction of a bridge. A point near this bridge was the agreed rendezous point that night between the accused and *agent provocateur* Leau (PW6) for the delivery of 2 kilogrammes of cannabis which the accused had agreed the previous night to deliver to Leau for RM900. The facts show that when the accused was arrested there was a bag containing a package of dried plant material clipped on the carrier of the motorcycle that he was riding. The dried plant material, according to the government chemist PW1 was 1,779.4 grammes of *cannabis* a dangerous drug within the meaning of s. 2 of the Act. Without resort to the presumptions under s. 37 of the Act but bearing in mind that the definition of "trafficking" under s. 2 includes the act of "transporting" any dangerous drug, this act having been made out against the accused, the offence of trafficking in a dangerous drug, cannabis, as per the charge has been made out on a *prima facie* basis.

The accused elected to give his evidence on oath. He called 3 persons to testify on his behalf

The accused denied knowledge of the bag of drugs. He denied that he had met Leau (PW6) on 19 October 1988 and that he had agreed to sell the drugs to him. He said he came to Pulau Langkawi from Satun (in Thailand) on 20 October 1988. He denied that the bag of drugs was recovered from the motorcycle he was riding on the night of his arrest. He said that the police recovered it from Mat Kengkang. He also denied the prosecution story that he was riding alone on a motorcycle when he was intercepted by the police at the area of the mosque. His story was that he had ridden to the area with his mother riding as pillion to meet Mat Kengkang to buy scrap iron; after he had alighted from the motorcycle and while approaching Mat Kengkang the police caught his mother who was standing by the side of his motorcycle and then he was arrested.

The accused, a Thai national, said he came to Langkawi from Satun on 20 October 1988 with his mother, wife and child and they then proceeded to Jalan Kisap to his sister's house. After a meal there he went to the house of one Tok Mat using the motorcycle of his brother-in-law Shaari (PW11) and returning to his sister's house late in the evening. He said his wife and child stayed at Tok Mat's house. He brought them there on the motorcycle. At about 10 p.m. he then went to Tok Mat's house to spend the night there. He was awakened by Tok Mat at about 11 p.m. to meet Mat Kengkang who invited him to go and see scrap iron.

According to him Mat Kengkang told him that his mother wanted him (the accused) to fetch her. He left to fetch his mother and promised to meet Mat Kengkang at a surau. He then brought his mother who was dressed in a sarong and a piece of cloth wrapped over her shoulders on his motorcycle to the meeting place. On arrival at the meeting place he saw

Mat Kengkang. He walked over to Mat Kengkang while his mother stood beside the motorcycle and he saw that Mat Kengkang was holding a bag. As he approached Mat Kengkang he heard the sound of people rushing towards Mat Kengkang. Mat Kengkang threw away the bag and ran. He turned round and saw that some people had caught his mother. He was then brought to the police station but his mother was not.

The accused's mother, DW2, said that she together with the accused, his wife and child came to Langkawi on the 20th where she visited her daughter's house at Kisap. She said that night while she stayed in the house of her daughter, the accused, his wife and child went to sleep in the house of Tok Mat. Her daughter (DW4) gave evidence which was substantially similar to her evidence. According to DW2 Mat Kengkang called for the accused and when she opened the door Mat Kengkang said he wanted to see the accused in order for him to see some scrap iron. Mat Kengkang told her to see the scrap iron first. She told him it was already late but Mat Kengkang told her the next day he was going to the sea. She then requested her to see Adnan first and she said the accused came about 10 to 15 minutes later and took her to the surau.

While DW2 did not state that it was DW4 who informed her of someone calling for Adnan, DW4 said that while she was upstairs she heard someone call for Adnan and she informed DW2 who was sleeping downstairs about it. She said that 15 to 20 minutes later she heard the sound of a motorcycle which was her husband's and then she saw Adnan ride away with her mother as pillion. But DW2 was obviously lying because she said under cross-examination that she got up to feed her child and while feeding the child, "I could not see but I could hear" and she said that after she fed the baby she went to sleep. How then did she see Adnan ride off with the mother as pillion? Caught off guard, her answer was to the effect she did not see the first motorcycle but when her mother sat as pillion she could see through a window, but later she said after feeding the baby she went to sleep. DW4 was not telling the truth and she was merely trying to support her mother's false story.

To come back to the evidence of DW2. She said she stood beside the motorcycle and saw 2 persons approach her and one of the men caught hold of her. She also saw Adnan walk away and then fall, and she saw 2 persons run away. The man who caught hold of her released her when he saw Adnan fall and ran towards Adnan. She said she then went to hide herself near a bush. She had no valid travel document. She stayed there till 5.30 a.m. and after an hour's wait she managed to get into a passing van which brought her to Kampong Langlang at Air Hangat. There she borrowed RM10 from Mat (DW3) and paid the van driver RM1.50. She then went to the seashore about 2 kilometres away and waited for a boat to Satun.

The man that DW2 called and identified as Mat, Tuan Ahmad bin Tuan Sidek (DW3) who is from Kampong Lallang said that one morning at about 8a.m DW2 borrowed RM10 from him to pay for a vehicle.

It has to be noted that DW2 said she took a ride in the van one hour after 5.30 a.m. DW3 said that the distance from his place (at Kampong Padang Lallang) to Jalan Kisap is about 6 or 7 miles. The whole distance from the town of Kuah by the sea to Padang Lallang along Jalan Kisap is about 12 miles - that is common knowledge. The place where she allegedly took the lift in the van is along this Jalan Kisap nearer to Kampong Padang Lallang and from what was stated by DW2 and DW3 it took the van incredibly from 6.30 a.m. to 8 a.m. to travel the distance. It is obvious both DW2 and DW3 were not telling the truth about the van and the borrowing of the money. The incident did not take place.

It will be remembered that the accused said that he came to Langkawi from Satun with his mother wife and child on 20 October 1988 and proceeded to his sister's house at Kisap. But the evidence of Inspector Majid (PW7) showed that as early as 15 October 1988 as a result of information from a police informer, Mat Kengkang (now deceased), he had arranged for Detective Constable Leau (PW6) (and this was confirmed by PW6) to be an "undercover agent" to get to know a Thai national who wanted to sell ganja (cannabis). Leau himself said he met a man, the accused, on 19 October 1988 with Mat Kengkang and agreed to buy 2 kilogrammes of cannabis for RM900 from the accused which was to be delivered the next night at 11.30 p.m. near a bridge along Jalan Kisap. Leau said he reported the incident to Inspector Majid. And Inspector Majid in his evidence confirmed that. There was no reason to disbelieve either of them. Thus when the accused said he arrived on 20 October 1988 at Langkawi he was lying.

As regards his evidence on the scrap iron why indeed was there a necessity to see the scrap iron that night? The accused said he did not know the reason. His mother said that Mat Kengkang told her he wanted to go out to the sea the next morning. I find it strange that the accused did not enquire from Mat Kengkang why he wanted him to see the scrap iron that night. More strange was why his mother had to accompany him to see the scrap iron late at night; she said lamely that she wanted to see that scrap iron that night as Mat Kengkang told her the scrap iron was not far from where she stayed. She added later that since it was late at night she wanted to follow him since it was not normal for the accused (aged then about 28 years) to go alone.

In considering the defence in the totality of the evidence I have to consider, *inter alia*, whether the evidence of Constable Leau is credit worthy. The evidence of Leau does not require corroboration because the evidence of a police spy or *agent provocateur* is not that of an accomplice and does not require corroboration. (See: *Rex v. Bickley* 73 JP 239 and *R. v. Mullins* 3 Cox's Cr. Cases 526 at p. 531 cited by Spenser Wilkinson J (as he then was) in *Teja Singh and Mohd. Nasir v. Public Prosecutor* [1950] MLJ 71 at 74 and 75). In any event under s. 40A of the Act no *agent provocateur* shall be presumed to be unworthy of credit by reason only of his, *inter alia*, having abetted the commission of an offence by any person under the Act if the abetment was for the sole purpose of securing evidence against such person. In my view Leau was a careful witness. He did not exaggerate. He did make attempts to improve the prosecution case. I accept his evidence. The clear evidence of Leau was that he met with the accused on 19 October 1988 and that he agreed to buy 2 kilogrammes of cannabis for RM900 and the accused had agreed to deliver the cannabis near a bridge at Jalan Kisap. He said he reported what transpired to Inspector Majid and Inspector Majid confirmed what Leau stated and as I have stated earlier there is no reason to disbelieve either of them. Why else would Inspector Majid have his men on 20 October 1988 deployed along Jalan Kisap to keep surveillance along the road starting from the point where the accused was reportedly staying up to the point where the meeting was to take place? The clear evidence of Yuslan (PW9) was that he saw a person get on a motorcycle and leave towards Air Hangat and that he conveyed to Inspector Majid on his walkie talkie set this fact. The clear evidence of Annuar (PW10) was that he saw a motorcycle pass his observation point and that he conveyed this fact to Inspector Majid. And it was clear from the evidence of Inspector Majid that he received both messages and this motorcyclist was intercepted by Inspector Majid and his men. This man was the accused. All these clearly show the accused and his mother were telling lies when they said he had his mother riding as a pillion and that after he had got down to approach Mat Kengkang he was arrested. It will be remembered

too that the clear prosecution evidence was that the bag of cannabis which the accused agreed to sell to Leau was found clipped to the carrier of the motorcycle when he was intercepted and arrested.

Considering the totality of the evidence no reasonable doubt has been created on the prosecution's case that the accused on 19 October 1988 agreed to sell cannabis to Leau and that while he was transporting the cannabis on a motorcycle to deliver it to Leau on 20 October 1988 he was intercepted and arrested. No reasonable doubt has been created on the prosecution's case that he trafficked in 1,779.4 grammes of cannabis. I find him guilty and convict him.

Also found at [1992] 2 CLJ 1234